Quality Mechanical, Inc. *and* Billy J. Holman

Sheet Metal Workers International Association, Local 88, AFL–CIO *and* Billy J. Holman. Cases 28–CA–10810 and 28–CB–3432

April 10, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On December 11, 1991, Administrative Law Judge George Christensen issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Quality Mechanical, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, and the Respondent, Sheet Metal Workers International Association, Local 88, AFL–CIO, Las Vegas, Nevada, its officers, agents, and representatives, shall take the action set forth in the Order.

Nancy S. Brandt, Esq. and *Cornele A. Overstreet, Esq.*, for the General Counsel.

Jerry Smith, of Las Vegas, Nevada, for Respondent Quality Mechanical, Inc.

Patricia S. Waldeck, of Los Angeles, California, for Respondent Sheet Metal Workers Local 88.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On June 25, 1991, I conducted a hearing at Las Vegas, Nevada, to try issues raised by a complaint issued on April 4, 1991, based on charges filed by Billy J. Holman, an individual, on March 14, 1991, against Quality Mechanical, Inc. (Employer) and Sheet Metal Workers International Association, Local 88, AFL–CIO (Union).

The complaint alleged the Employer and the Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act) by the Union's causing the Employer to deny Holman employment until and unless Holman satisfied union requirements for Holman's restoration to good standing union membership, despite the absence of any union-security agreement between the Employer and the Union.

The Employer and the Union conceded the Employer recognized the Union as the exclusive collective-bargaining representative of the Employer's sheet metal workers, that those employees' hours and working conditions were covered by a collective-bargaining agreement between the Employer and the Union, and the agreement did not contain any provision requiring the maintenance of good standing union membership as a condition of employment, but the Union denied it caused the Employer to deny Holman employment until and unless Holman complied with the Union's requirements for restoration to good standing membership and the Employer denied it denied Holman employment until and unless he complied with the Union's requirements for restoration to good standing membership.

The issues created by the foregoing are whether the Union and the Employer took the actions just described and, if so, whether they violated the Act.

The General Counsel and the Union appeared by counsel; the Employer appeared by its general superintendent (Jerry Smith); all were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. The General Counsel and the Union filed briefs.

[1] The judge found, inter alia, that the Respondent Union violated Sec. 8(b)(1)(A) and (2) of the Act by causing the Respondent Employer to deny employee Billy Holman continued employment unless he secured reinstatement to good-standing union membership. We agree. The Union excepts, contending that it never ''requested or instructed'' that the Employer terminate or otherwise discriminate against Holman for his failure to pay dues or maintain his good-standing membership, and therefore, it never ''caused'' the Employer to violate the Act. We find no merit in this exception. In addition to the case law cited by the judge in support of his finding, we also rely on *Food & Commercial Workers Local 454 (Central Soya)*, 245 NLRB 1295 (1979).

In its exceptions, the Respondent Union also contends that the judge erred by including the standard Board reinstatement language in his recommended Order because, according to the Union, Holman had already been offered and had accepted reinstatement with the Respondent Employer prior to the hearing. We find no merit in this exception, as the question whether Holman had already been offered and accepted reinstatement in these circumstances is best left to the compliance stage of this proceeding.

In the third paragraph of sec. II,A, of his decision, the judge inadvertently stated that Holman applied to the Employer for employment in ''November 1969.'' We find he meant to state: ''November 1989.''

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT[1]

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answers thereto admitted, and I find at all pertinent times the Employer was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

At all material times the Employer was a construction contractor installing heating, ventilating, and air conditioning equipment; employed sheet metal workers; and through its affiliation with the Southern Nevada Air Conditioning & Sheet Metal Contractors Association (Association) was party to an agreement with the Union covering the wages, hours, and working conditions of its sheet metal workers.

The agreement did not contain any provision requiring the Employer's sheet metal workers to acquire or maintain good standing union membership as a condition of employment but did require the Employer secure new hires through referral or dispatch from and by the Union.

Holman applied directly to the Employer for employment as a sheet metal worker in November 1969; was referred by the Employer to the Union to secure a union dispatch; went to the union hall; joined the Union; the Union gave him a dispatch to the Employer for hire as a sheet metal worker; the employer placed him on the payroll and put him to work.

At that time the Union's initiation fee was $1200 and its dues were $43 per month. Holman paid the Union $109.50 and was credited on the Union's books for payment of December 1989 dues and $25 towards his $1200 initiation fee. He made dues payments to the Union of $43 in February, March, and April 1990, plus a payment of $1175 in April 1990, which was credited as payment of January, February, and March 1990 dues, plus the balance of the initiation fee. He made no payments to the Union in May and on May 31, 1990, his union membership was suspended (suspension was automatic on dues delinquency for 2 consecutive months). In June 1990, he paid $86 to the Union, which was credited as a ''reinstatement fee'' of $43 and payment of June 1990 dues. He paid $43 in July, which was credited as payment of his July 1990 dues. He made no further payments to the Union; was suspended from union membership on September 30, 1990, and dropped from membership on December 31, 1990 (members were dropped from membership after 5 consecutive months of dues delinquencies). On a member's drop from membership, payment equal to the original initiation fee was required to secure reinstatement to good standing union membership.

Following the suspension of Holman's union membership on May 31, 1990, his foreman, Randy Long,[2] approached him at work, informed him he was delinquent in his union dues and instructed him to go to the union hall and pay his dues by noon (it was morning) or the Employer would have to lay him off.[3] He complied, as noted, tendering $86 to the Union in June and returning to work.

The Union took no action concerning Holman's failure to make any payments to the Union after July 31, 1990, until February 20, 1991, when Union Office Manager Alice Dodd telephoned Smith and informed him Holman was delinquent in his union dues.[4] Smith relayed the message to Raymon Leyva, Holman's job foreman.[5]

Leyva told Holman the Union called, said Holman was delinquent in his dues, instructed Holman to go to the union hall, straighten out his dues delinquency, and he could then come back to work.[6] Holman went to the union hall and spoke to Union Secretary Deanna Melton.[7] Melton advised Holman he would have to pay dues for the current month, a similar amount as a reinstatement fee,[8] and execute a document authorizing the Employer to take periodic deductions from his pay to cover his $1200 initiation fee,[9] in order to be restored to good standing union membership. She also furnished Holman with a document authorizing his withdrawal from the bank holding vacation pay entitlements for his currently payable vacation pay.

When Holman left the union hall, Melton was under the impression he was going to the bank to secure his vacation

[1] While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is discredited.

[2] Jerry Smith, the Employer's general superintendent, testified at that time Long was authorized to discipline employees, grant time off, and effectively recommend the discharge of employees. I credit that testimony and find when Long approached and spoke to Holman he was a supervisor and agent of the Employer acting on its behalf within the meaning of Sec. 2 of the Act.

[3] Smith conceded the Union periodically informed the Employer when sheet metal workers employed by the Employer were delinquent in their dues and the Employer, on receiving that information, instructed the delinquent to go to the union hall on paid time and take care of the delinquency. That testimony is credited and I so find.

[4] The complaint alleged and the Employer and the Union conceded at all pertinent times that Smith was a supervisor and agent of the Employer acting on its behalf and Dodd was an agent of the Union acting on its behalf within the meaning of Sec. 2 of the Act.

[5] The Employer conceded and I find at that time Leyva was a supervisor and agent of the Employer acting on its behalf within the meaning of Sec. 2 of the Act.

[6] Smith and Dodd conceded it was standard practice for the Union to inform the Employer when employees were delinquent in their dues payment and for the Employer to send such employees, on paid time, to remedy the delinquencies.

[7] The Union conceded at that time Melton was an agent of the Union acting on its behalf within the meaning of Sec. 2 of the Act.

[8] Bill Brooks, the Union's business manager and an admitted agent of the Union, acting on its behalf within the meaning of Sec. 2 of the Act, testified the Union levied a reinstatement fee equivalent to dues for 1 month plus payment of dues for the current month to secure reinstatement to union membership within the 30 days following nonpayment of dues for 2 consecutive months, and also requiring the payment of initiation fee of $1200 following nonpayment of dues for 5 consecutive months.

[9] Referred to by the union agent as a ''re-initiation'' fee.

pay, return, and comply with the requirements she outlined for his reinstatement.

Holman secured his vacation pay but did not return to the union hall or to work, reluctant to pay a second initiation fee. Smith telephoned Holman when Leyva informed him Holman did not come back to work and asked Holman when he was coming back to work. Holman told Smith that the Union was demanding to restore his good standing union membership and said he would try to get the matter resolved. Smith told Holman to let him know when he was straightened out with the Union and he would see about putting Holman back to work.

On February 22 (a Friday), Smith and Holman had a second conversation. Smith asked Holman if he was straightened out with the Union yet. Holman replied he was not, but would try to do so February 25 (the following Monday). Smith repeated his request that Holman advise him when he was straightened out with the Union and he would see about putting Holman back to work.

Smith and Holman communicated a third time on February 25; Smith again asked Holman if he was straightened out with the Union yet; Holman replied he hoped to do so that day. Smith repeated his request that Holman contact him if he resolved his problem with the Union.

Holman decided he was not going to comply with the Union's conditions for reinstating him to good standing membership and, on March 14, filed charges against the Employer and the Union, which resulted in this proceeding.

B. *Conclusions*

Section 14(b) of the Act bars the negotiation and application of any agreement or contract between an employer and a union conditioning the continued employment of that employer's workers on the acquisition and/or maintenance of membership in that union within any state which has enacted a statute prohibiting such an agreement. Nevada has such a law, which explains why the agreement between the Association and the Union does not contain any provision requiring the Employer's workers to acquire or maintain membership in the Union as a condition of their continued employment.

The facts recited above establish the Employer and the Union evolved a system which circumvents the intention of Section 14(b) of the Act and the Nevada statute; i.e., a cooperative arrangement in which the Union notifies the Employer whenever one of its employees has failed to maintain his good standing membership in the Union by failing to timely pay dues required for the maintenance of good standing and the Employer instructs the delinquent employee to go to the union hall and make arrangements satisfactory to the Union for restoration to good standing, upon which he may return to work without loss of pay for the time spent to satisfy the Union's requirements for such restoration. While that arrangement worked both to the Union's and the Employer's satisfaction in most cases,[10] it ran into trouble when Holman, reluctant to pay another $1200 fee, refused to do so and filed the instant charges.

The Union contends it cannot be held liable in this case because it was not established the Union asked the Employer to deny Holman employment unless and until he satisfied the Union's requirements for restoration to good standing membership.[11]

The General Counsel notes, however, the Board and reviewing courts have long held a union may be held accountable for results triggered by what on the surface appears an innocent act which the union well knew would produce a desired result[12] and it is reasonable to infer or conclude, as I do, the Union well knew and expected the Employer, on receiving the information from the Union that Holman had failed to maintain good standing membership in the Union, as in the past would instruct Holman to go to the union hall and satisfy the Union's requirements for reinstatement to good standing, after which he could return to work.[13]

I therefore conclude the Union, by Dodd's communication, however innocuous on its face, had a result anticipated and expected of the Employer, i.e., an employer instruction to Holman to leave his job during working hours, go to the union hall and satisfy the Union's requirement for reinstatement to good standing, after which he would be permitted to return to work without loss of pay, with the obvious corollary he would *not* be permitted to return to work if he did not satisfy the Union's requirements for restoration to good standing union membership (substantiated by Leyva's instructions to Holman and by Smith's conditioning Holman's return to work on his ''straightening out'' his ''problem'' with the Union).

The recited facts support my conclusion the Employer aided, abetted, and enforced a requirement its sheet metal workers maintain good standing union membership while in its employ by conditioning Holman's continued employment on his satisfaction of the Union's requirements for securing reinstatement to good standing union membership.

On the basis of the foregoing, I conclude the Union violated Section 8(b)(1)(A) and (2) of the Act and the Employer violated Section 8(a)(1) and (3) of the Act by the former causing the latter to deny Holman continued employment until and unless he satisfied the Union's requirements for reinstatement to good standing union membership.

CONCLUSIONS OF LAW

1. At all pertinent times, the Employer was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At pertinent times Long, Smith, and Leyva were supervisors and agents of the Employer acting on its behalf within the meaning of the Act.

3. At pertinent times Brooks, Dodd, and Melton were agents of the Union acting on its behalf within the meaning of the Act.

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[10] Employer and union witnesses testified to the successful operation of the system over preceding years.

[11] Dodd testified she only notified Smith that Holman was delinquent in his dues and the record fails to establish any understanding between the Union and the Employer that the latter would withhold employment until such delinquency was resolved to the Union's satisfaction.

[12] ''If a nod or a wink or a code was used in place of the word 'strike' there was just as much a strike called as if the word 'strike' had been used.'' *U.S. v. Mine Workers*, 77 F.Supp. 563, 566 (D.D.C. 1948), affd. 177 F.2d 29 (D.C. Cir. 1949), cert. denied 338 U.S. 871 (1949).

[13] Cf. *M. W. Kellogg Constructors*, 273 NLRB 1049, 1051 (1984).

4. The Employer violated Section 8(a)(1) and (3) of the Act by denying Holman continued employment until and unless he secured reinstatement to good standing union membership.

5. The Union violated Section 8(b)(1)(A) and (2) of the Act by causing the Employer to deny Holman continued employment until and unless he secured reinstatement to good standing union membership.

6. The aforesaid unfair labor practices affected and affect commerce within the meaning of the Act.

THE REMEDY

Having found the Employer and the Union engaged in unfair labor practices, I recommend they be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act.

Having found the Employer and the Union violated the Act by the Employer's denying Holman employment until and unless he satisfied the Union's requirements for restoration to good standing membership and the Union's causing the Employer to so act, I recommend the Employer be directed to offer Holman reinstatement to the job he held immediately prior to such denial, with seniority and all other rights, benefits, privileges, and practices under the agreement between the Association and the Union restored, and Holman be made whole, jointly and severally, by the Employer and the Union, for any wage and benefit losses he suffered due to the discrimination practiced against him, calculated in the manner set out in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest on the sum or sums due computed in accordance with the formulae set out in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Isis Plumbing Co*., 138 NLRB 716 (1962). In the event any sums are payable to funds established under the agreement, the amount due plus any interest or penalties due shall be calculated in the manner set out in *Merryweather Optical Co*., 240 NLRB 1213 (1970). I also recommend the Union be ordered to advise the Employer and Holman, in writing, the Union has no objection to Holman's employment, regardless of whether or not he maintains good standing membership in the Union and the Employer be directed, in writing, to advise Holman it will employ him without regard to whether he maintains good standing membership in the Union. Finally, I recommend the Employer be directed to post appropriate notices directed to its employees and the Union post appropriate notices directed to its members.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

A. Respondent Quality Mechanical, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employment to Billy J. Holman until and unless he satisfies the requirements of Sheet Metal Workers International Association, Local 88, AFL–CIO for restoration to good standing membership.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the National Labor Relations Act, including the right to refrain from joining, assisting, or supporting Local 88.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Billy J. Holman reinstatement to the job he held immediately prior to the discriminatory denial of his employment and restore to him all seniority and other rights, privileges, and benefits he enjoyed prior to the discrimination practiced against him.

(b) Make Billy J. Holman whole jointly and severally with Local 88 for losses he suffered by virtue of the discrimination practiced against him, in the manner set out in the remedy section of this decision.

(c) Advise Billy J. Holman, in writing, that he will be employed without regard to whether he maintains good standing membership in Local 88.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, reports and all and any other records necessary to determine what payments will make Billy J. Holman whole for the discrimination practiced against him.

(e) Post at its facilities at Las Vegas, Nevada, copies of the attached notice marked ''Appendix A.''[15] Copies of the notice, on forms provided by the Regional Director for Region 28, shall be signed by an authorized representative of Quality Mechanical, Inc., posted immediately after their receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has been taken to comply.

B. Respondent Sheet Metal Workers International Association, Local 88 AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing Quality Mechanical, Inc. to deny employment to Billy J. Holman until and unless he meets Local 88's requirements for restoration to good standing membership.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act, including the right to refrain from joining, assisting, or supporting Local 88.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Billy J. Holman whole, jointly and severally, with Quality Mechanical, Inc., for losses he suffered by virtue of the discrimination practiced against him, in the manner set out in the remedy section of this decision.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(b) Advise Quality Mechanical, Inc. and Billy J. Holman, in writing, Local 88 has no objection to the employment of Billy J. Holman, whether he maintains good standing membership in Local 88.

(c) Post at its facilities at Las Vegas, Nevada, copies of the attached notice marked ''Appendix B.'' [16] Copies of the notice, on forms provided by the Regional Director for Region 28, shall be signed by an authorized representative of Local 88, posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken to ensure the notices are not altered, defaced, or covered by other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[16] See fn. 15.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deny employment to Billy J. Holman until and unless he satisfies the requirements of Sheet Metal Workers International Association, Local 88, AFL–CIO for restoration to good standing membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees' exercise of their rights under Section 7 of the Act, including their right to refrain from joining, assisting or supporting Local 88.

WE WILL reinstate Billy J. Holman to the job he held prior to our discriminatory denial of his employment with all seniority and other rights, benefits, and privileges restored.

WE WILL make Billy J. Holman whole, jointly and severally, with Local 88 for any losses he suffered due to our unlawful discrimination against him.

WE WILL advise Billy J. Holman, in writing, that we will employ him whether or not he maintains good standing membership in Local 88.

QUALITY MECHANICAL, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause Quality Mechanical, Inc. to deny employment to Billy J. Holman until and unless he satisfies our requirements for his restoration to good standing membership.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights under Section 7 of the National Labor Relations Act, including their right to refrain from joining, assisting, or supporting Local 88.

WE WILL make Billy J. Holman whole, jointly and severally, with Quality Mechanical, Inc., for losses he suffered by virtue of our causing Quality Mechanical, Inc. to deny him employment until and unless he satisfied our requirements for his restoration to good standing membership.

WE WILL advise Quality Mechanical, Inc. and Billy J. Holman, in writing, we have no objection to the employment of Billy J. Holman, whether he maintains good standing membership in Local 88.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 88, AFL–CIO